Datuk Seri Anwar bin Ibrahim v Wan Muhammad Azri bin Wan Deris

HIGH COURT (KUALA LUMPUR) — SUIT NO 23NCVC-37–03 OF 2013
ROSILAH YOP JC
19 FEBRUARY 2014

Tort — Defamation — Damages — Principles in assessing damages for defamation — Whether exemplary damages to be granted

Tort — Defamation — Defences — Fair comment — Elements to be proven — Statements not proven to be true or a fair comment on a matter of public interest — Whether defence established

Tort — Defamation — Justification — Elements to be proven — Whether defendant's allegations proven to be true — Whether defence established

Tort — Defamation — Libel — Sexually oriented defamatory statements regarding plaintiff published in defendant's website — Elements to be proved — Whether statements defamatory — Whether statements referring to plaintiff — Whether statements calculated to expose plaintiff to hatred, ridicule or contempt in the mind of reasonable reader — Whether requirement of publication to third party satisfied — Whether defences of qualified privilege, fair comment and justification available — Whether defamation established

Tort — Defamation — Qualified privilege — Elements to be proven — Duty to make statements and corresponding interest to receive statements not proven — Whether defence established

The plaintiff was known internationally as a statesman and political leader. The defendant was the owner and operator of a website / blog with the URL in *www.papagomo.com* and known as 'Papa Gomo'. The defendant's website had published statements and articles containing sexually oriented defamatory statements regarding the plaintiff. The plaintiff through his solicitor demanded the defendant to retract, apologise and pay compensation but the defendant failed to do so. Hence the plaintiff commenced the present suit for defamation. The defendant claimed that he was not the owner, operator or author of the articles and was not responsible for the publication of any article in

www.papagomo.com. The defendant also raised the defences of qualified privilege, fair comment and justification. A

Held, allowing the plaintiff's claim with costs of RM50,000:

(1) To succeed in defamation action, the plaintiff has to establish that: (a) the statements are defamatory; (b) the statement must refer to the plaintiff; and (c) there must be a publication (see para 19). B

(2) The defamatory statements had defamed the plaintiff. The statements were very obnoxious and obscene. The statements and the images (defamatory statements) that were pleaded, in ordinary and natural meaning were understood that the plaintiff was: an immoral person; a person with no dignity; a person unfit to hold public office; not qualified as a political leader; not fit to be Prime Minister of Malaysia, and a leader who was not responsible and could not be trusted (see paras 20–21). C D

(3) As to whether the statements were capable of being and were, in fact defamatory of the plaintiff, the test to be considered was whether the statements were calculated to expose the plaintiff to hatred, ridicule or contempt in the mind of a reasonable reader would tend to lower the plaintiff in the estimation of right thinking society generally. The ordinary and natural meaning may therefore include any inference or implication which any inference or implication which an ordinary reasonable reader would draw from the statements (see paras 22–23). E F

(4) The statements had exposed the plaintiff to hatred, ridicule or contempt in the mind of a reasonable reader and would tend to lower the plaintiff in the estimation of right thinking society generally. It also attacked the moral character of the plaintiff. Hence, the statements were defamatory of the plaintiff (see paras 24–25). G

(5) In a libel action the statements complained of must refer to the plaintiff. The statements referred to the plaintiff personally. The website or blog was specially made to defame the plaintiff. Any reasonable reader reading the defamatory statements published on the website or blog Papagomo would know that the defamatory statements referred to the plaintiff (see paras 26 & 31). H

(6) The defamatory statements were published in the website www.papagomo.com ie in the internet and the people all over the world could get access to the website meaning that there was a wide publication of the defamatory statements. It was a judicial notice that the internet is used worldwide. The online defamatory statements or published on the internet amounted to publication (see paras 46–48). I

(7) The plaintiff had proved that the defendant was the person named

Papagomo and published the defamatory statements of the plaintiff through the website *www.papagomo.com* (see para 39).

(8) It was not proven by the defendant that he had an interest or duty, legal, social or normal to make the statements. The defendant failed to prove that there was a corresponding interest from the other side (to whom it is made) to receive it. The defendant had not proved the defence of qualified privilege (see para 68).

(9) There was no iota of evidence to prove that the defamatory statements as pleaded were true or a fair comment on a matter of public interest. It is not proven that the defamatory statements were matters of public interest. Hence, this defence failed (see para 75).

(10) There was no evidence adduced to establish that the allegations by the defendant against the plaintiff were true. Hence, the defendant had failed to prove his defence of justification against the plaintiff for defamation (see paras 79–80).

(11) The defamatory statements that were published by the defendant were very obnoxious and obscene. The sting of the defamatory statements would tarnish the reputation of the plaintiff. The defendant's failure to apologise and the defendant's conduct in repeating the allegations in a vicious manner in subsequent blog entries in response to the letter of demand, allowed the court to grant the exemplary damages to the plaintiff. Based on the standing of the plaintiff, the fact that the defamatory statements were extreme, vicious and vulgar and were published widely and the defendant failed to apologise to the plaintiff, a sum of RM800,000 was fair and reasonable to be awarded as general and exemplary damages (see paras 89 & 91).

[Bahasa Malaysia summary

Plaintif dikenali di peringkat antarabangsa sebagai negarawan dan pemimpin politik. Defendan adalah pemilik dan operator laman web / blog dengan URL di *www.papagomo.com* dan dikenali sebagai 'Papa Gomo'. Laman web defendan telah menerbitkan kenyataan dan artikel mengandungi kenyataan-kenyataan seksual berunsur fitnah berhubung plaintif. Plaintif melalui peguamcaranya menuntut agar defendan menarik balik, memohon maaf dan membayar pampasan tetapi defendan gagal berbuat demikian. Justeru plaintif telah memulakan guaman ini kerana fitnah. Defendan mendakwa bahawa dia bukan pemilik, operator atau penulis artikel-artikel tersebut dan tidak bertanggungjawab untuk penerbitan mana-mana artikel dalam *www.papagomo.com*. Defendan juga menimbulkan pembelaan-pembelaan perlindungan bersyarat, komen adil dan justifikasi.

Diputuskan, membenarkan tuntutan plaintif dengan kos sebanyak RM50,000: A

(1) Untuk berjaya dalam tindakan fitnah, plaintif hendaklah membuktikan bahawa: (a) kenyataan-kenyataan tersebut berunsur fitnah; (b) kenyataan itu hendaklah merujuk kepada plaintif; dan (c) perlu ada penerbitan (lihat perenggan 19). B

(2) Kenyataan-kenyataan berunsur fitnah itu telah memfitnahkan plaintif. Kenyataan-kenyataan itu menjijikkan dan lucah. Kenyataan-kenyataan dan imej-imej itu (kenyataan-kenyataan berunsur fitnah itu) yang dipli, dalam maksud biasa dan semula jadi difahami bahawa plaintif adalah: seorang yang tidak bermoral; seorang tidak bermaruah; seorang yang tidak layak untuk memegang jawatan awam; tidak layak menjadi pemimpin politik; tidak layak menjadi Perdana Menteri, dan pemimpin yang tidak bertanggungjawab dan tidak boleh dipercayai (lihat perenggan 20–21). C D

(3) Berhubung sama ada kenyataan-kenyataan itu boleh menjadi dan adalah, pada hakikatnya berunsur fitnah terhadap plaintif, ujian yang patut dipertimbangkan adalah sama ada kenyataan-kenyataan itu dikira sebagai mendedahkan plaintif kepada kebencian, ejekan atau penghinaan dalam pemikiran pembaca yang munasabah yang akan cenderung untuk merendahkan martabat plaintif dalam pandangan masyarakat berfikiran wajar pada amnya. Maksud biasa dan semula jadi dengan itu boleh termasuk apa-apa inferens atau implikasi apa-apa inferens atau implikasi yang akan dibuat oleh pembaca munasabah yang biasa berdasarkan kenyataan-kenyataan itu (lihat perenggan 22–23). E F

(4) Kenyataan-kenyataan telah mendedahkan plaintif kepada kebencian, ejekan atau penghinaan dalam pemikiran pembaca yang munasabah dan cenderung untuk merendahkan martabat plaintif dalam pemikiran masyarakat yang berfikiran waras pada amnya. Ia juga menyerang akhlak moral plaintif. Justeru, kenyataan-kenyataan tersebut berunsur fitnah terhadap plaintif (lihat perenggan 24–25). G

(5) Dalam tindakan libel kenyataan-kenyataan yang diadukan hendaklah merujuk kepada plaintif. Kenyataan-kenyataan itu merujuk kepada plaintif secara peribadi. Laman web atau blog itu telah dibuat khusus untuk memfitnah plaintif. Mana-mana pembaca yang munasabah yang membaca kenyataan-kenyataan berunsur fitnah yang diterbitkan dalam laman web atau blog Papagomo akan mengetahui bahawa kenyataan-kenyataan berunsur fitnah itu adalah merujuk kepada plaintif (lihat perenggan 26 & 31). H I

(6) Kenyataan-kenyattan berunsur fitnah yang diterbitkan dalam laman web *www.papagomo.com* iaitu dalam internet dan orang di seluruh dunia boleh memasuki laman web itu bermaksud bahawa terdapat penerbitan

kenyataan-kenyataan berunsur fitnah itu. Adalah notis kehakiman bahawa internet digunakan di seluruh dunia. Kenyataan-kenyataan berunsur fitnah secara dalam talian atau diterbitkan di internet adalah penerbitan (lihat perenggan 45–47).

(7) Plaintif telah membuktikan bahawa defendan adalah orang yang bernama Papagomo dan telah menerbitkan kenyataan-kenyataan berunsur fitnah tentang plaintif melalui laman web *www.papagomo.com* (lihat perenggan 39).

(8) Ia tidak dibuktikan oleh defendan bahawa dia mempunyai kepentingan atau kewajipan, dari segi undang-undang, sosial atau kebiasaan untuk membuat kenyataan-kenyataan itu. Defendan telah gagal untuk membuktikan bahawa terdapat kepentingan sama daripada pihak lain (kepada orang yang dibuatnya) untuk menerimanya. Defendan tidak membuktikan pembelaan perlindungan bersyarat (lihat perenggan 67).

(9) Tiada keterangan yang membuktikan bahawa kenyataan-kenyataan berunsur fitnah yang dipli adalah komen yang benar atau adil demi hal kepentingan awam. Ia tidak dibuktikan bahawa kenyataan-kenyataan berunsur fitnah itu adalah hal berkaitan kepentingan awam. Justeru, pembelaan ini telah gagal (lihat perenggan 74).

(10) Tiada keterangan yang dikemukakan untuk membuktikan bahawa dakwaan oleh defendan terhadap plaintif adalah benar. Justeru, defendan telah gagal untuk membuktikan pembelaan justifikasinya terhadap plaintif kerana fitnah (lihat perenggan 78–79).

(11) Kenyataan-kenyataan berunsur fitnah yang diterbitkan oleh defendan amat menjijikkan dan lucah. Akibat daripada kenyataan-kenyataan berunsur fitnah itu akan menjejaskan reputasi plaintif. Kegagalan defendan mohon maaf dan perbuatan defendan mengulangi dakwaan itu secara kasar berikutan entri blog sebagai tindak balas kepada surat tuntutan, membenarkan mahkamah memberikan ganti rugi teladan kepada plaintif. Berdasarkan pendirian plaintif, fakta bahawa kenyataan-kenyataan berunsur fitnah itu adalah melampau, kejam dan lucah dan telah diterbitkan secara meluas dan defendan telah gagal meminta maaf kepada plaintif, maka jumlah RM800,000 adalah adil dan munasabah untuk diawardkan sebagai ganti rugi am dan teladan (lihat perenggan 88 & 90).]

Notes

For cases on damages, see 2(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 377–404.

For cases on defences, see 2(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 425–449.

For cases on justification, see 2(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 506–519.

For cases on libel, see 2(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 523–723.

For cases on qualified privilege, see 2(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 770–796.

Cases referred to

Abduk Razak bin Mohd Noor v Wan Muhammad Azri bin Wan Deris, Kuala Lumpur High Court, Writ Summons No 23NCVC-17–01 of 2012 (unreported), HC (refd)

Abdul Rahman Talib v Seenivasagam & Anor [1966] 2 MLJ 66, FC (folld)

Adam v Ward [1917] AC 309, HL (refd)

Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315; [1989] 1 CLJ Rep 321, HC (refd)

Chin Choon @ Chin Tee Fut v Chua Jui Meng [2005] 3 MLJ 494; [2005] 2 CLJ 569, CA (refd)

Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371; [1999] 1 CLJ 461, CA (refd)

Hoe Thean Sun & Anor v Lim Tee Keng [1999] 3 MLJ 138; [1999] 1 CLJ 187, HC (refd)

Institute of Commercial Management United Kingdom v New Straits Times Press (Malaysia) Bhd [1993] 1 MLJ 408; [1993] 2 CLJ 365, HC (refd)

International Times & Ors v Leong Ho Yuen [1980] 2 MLJ 86; [1980] 1 LNS 31, FC (refd)

JB Jeyaretnam v Goh Chok Tong [1985] 1 MLJ 334 (refd)

Knupffer v London Express Newspaper Ltd [1944] AC 116, HL (refd)

Morgan v Odhams Press Ltd and Another [1971] 2 All ER 1156, HL (refd)

S Pakianathan v Jenni Ibrahim [1988] 2 MLJ 173; [1988] 1 CLJ Rep 233, SC (folld)

Tun Datuk Patinggi Haji Abdul Rahman Ya'akub v Bre Sdn Bhd & Ors [1996] 1 MLJ 393; [1995] 1 LNS 304, HC (refd)

Legislation referred to

Evidence Act 1950 s 114(g)

Rosilah Yop JC:

THE PLAINTIFF'S CASE

[1] The plaintiff is the leader of the opposition party in Parliament, member of Parliament for the Permatang Pauh constituency, the chief of the Parti Keadilan Rakyat ('PKR') and served as Malaysian Deputy Prime Minister from

1993 to 1998 and Minister of Finance from 1990 to 1998. The plaintiff is known internationally as a statesman and political leader.

[2] The defendant is the owner and operator of a website/blog with the URL in *www.papagomo.com* and known as 'Papa Gomo'.

[3] On 16 March 2013, 17 March 2013, 19 March 2013 and 20 March 2013, defendant website *www.papagomo.com* had defamed the plaintiff through statements in the articles and published of the following:

(a) *BREAKING NEWS — Video Seks Anwar Ibrahim dan Gay Tersebar*;

(b) *XXX — Video Anwar Ibrahim*;

(c) *Saman Homoseksual RM100 Juta — Permohonan Maaf Papa Gomo Kepada Anwar Ibrahim*

that contains defamatory statements as pleaded in paras 3, 4 and 5 of the statement of claim.

[4] The defendant willfully and maliciously published the defamatory statements with the intention to discredit the plaintiff to show that he is an immoral person, not dignified, ineligible to hold public office, not eligible to become political leader, not fit to be Prime Minister and a leader who is not responsible and cannot be trusted.

[5] The plaintiff through his solicitor, Messrs Edwin Lim, Suren & Soh was on 19 March 2013 demanded the defendant to retract, apologise and pay compensation but the defendant has failed to do so.

THE DEFENDANT'S CASE

[6] The defendant at all material times is not the owner, operator and/or authors of articles or responsible for the publication of any article in any blog that has a URL in *www.papagomo.com*.

[7] The defendant has never published and/or caused to be published and/or distribution of any article and/or any statements defamatory and/or any images and/or video and/or web link that displays a series of images on 16 March 2013, 17 March 2013, 19 March 2013 and 20 March 2013.

[8] The defendant never accused the plaintiff of being immoral, not dignified, not fit to hold public office, not fit to be a political leader of the country, not fit to be the Prime Minister of Malaysia, is a leader who is irresponsible and cannot be trusted.

[9] The defendant did not take any action until the publication of the defamatory statements and never maliciously to dishonor the plaintiff or lead the plaintiff to suffer severe injuries to character, personal reputation, political and affect the plaintiff's position.

[10] The website has no known owner and no publication has taken place because anyone who reads anything contained in the website/blog has read completely voluntarily. In short, if there is any issue, it is done by the readers themselves. This is different compared to the issue involving newspapers or magazines.

[11] Alternatively, if there is any truth in the statements issued (if any), those who had caused the publication and/or publication of any article and/or any defamatory statements and/or any images and/or video and/or link the website presents a series of images on the website have been doing it for conditional coverage of events and details are basic comment, public interest and justification.

ISSUES TO BE TRIED

[12] Agreed issues to be tried has been tendered in court and marked as D. The issues are as follows:

(a) sama ada defendan telah pada tarikh 16 Mac 2013, 17 Mac 2013, 19 Mac 2013 dan 20 Mac 2013 telah memfitnah plaintif melalui perkataan-perkataan di bawah artikel/penyiaran berikut:

(i) *BREAKING NEWS — Video Seks Anwar Ibrahim dan Gay Tersebar;*

(ii) *XXX — Video Anwar Ibrahim;*

(iii) *Saman Homoseksual RM100 Juta — Permohonan Maaf Papa Gomo Kepada Anwar Ibrahim*

(b) sama ada defendan merupakan pemilik dan/atau penerbit dan/atau penulis di laman web *www.papagomo.com*;

(c) sama ada defendan boleh dikaitkan dengan laman web *www.papagomo.com* dan perkataan-perkataan tersebut;

(d) sama ada perkataan-perkataan tersebut membawa kepada maksud-maksud dan difahami sebagai mempunyai maksud-maksud sebagaimana yang telah diplidkan di dalam perenggan 9 penyataan tuntutan;

(e) sama ada defendan boleh mengguna pakai pembelaan justifikasi;

(f) sama ada defendan boleh mengguna pakai pembelaan kepentingan awam perlindungan bersyarat dan butir-butir yang menjadi asas komen (*fair comment*) dan public interest;

(g) Jika sekiranya,mahkamah mendapati perkataan-perkataan tersebut adalah fitnah, apakah bentuk gantirugi yang boleh dituntut oleh plaintif.

THE DEFENDANT'S DEFENCE

[13] The defendant denies the website/blog *www.papagomo.com* owned by him. The defendant stated that he never publishes the defamatory statements, pictures, videos or any other web-links that display series of images defamatory of the plaintiff. The defendant never received a demand letter from the plaintiff.

[14] The defendant's defence (in the alternative) is that:

(a) the defendant is not the owner, operator or authors of articles nor responsible for the publication of any articles;

(b) the statements and the images made under qualified privilege, or;

(c) the statements are fair comment, or;

(d) statements or an image or a video as claimed by the plaintiff are true to the facts and issues (justification).

ANALYSIS AND FINDINGS OF THE COURT

[15] It would be useful to first set what a plaintiff has to prove to establish a cause of action in defamation. It is trite law that to succeed in defamation action, three basic elements the plaintiff has to establish, these are:

(a) the statements are defamatory;

(b) the statement must refer to the plaintiff; and

(c) there must be a publication (see *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315; [1989] 1 CLJ Rep 321).

WHETHER THE STATEMENTS ARE DEFAMATORY

[16] The plaintiff has pleaded in paras 3, 4 and 5 in the statement of claim the defamatory statements made by the defendant.

[17] The statements are as follows:

3. i. Pada 16 Mac 2013, defendan telah dengan salah dan berniat jahat menyiarkan di dalam laman web/blog *www.papagomo.com* tersebut perkataan-perkataan berikut:

(a) *Video Seks Anwar Ibrahim Dan Lelaki Gay Tersebar;*

(b) *… tapi yang pasti tu adalah Anwar Ibrahim Bangsat. Ni kali video dengan Jantan Gay pulak;*

ii. Di bawah tajuk 'BREAKING NEWS' — 'Video Seks Anwar Ibrahim Dan Gay Tersebar' tersebut, defendan juga dengan salah dan niat jahat menyiarkan suatu imej;

iii. Di bawah tajuk 'BREAKING NEWS' — 'Video Seks Anwar Ibrahim Dan Gay Tersebar' tersebut, defendan dengan salah dan niat jahat telah meletakkan satu pautan web ('weblink') yang memaparkan satu siri imej;

4. i. Pada 17 Mac 2013, defendan telah dengan salah dan berniat jahat menyiarkan di dalam laman web/blog *www.papagomo.com* tersebut perkataan-perkataan berikut:

a. semua yang dilakukan apabila salah akan dihalakan kepada UMNO walhalkan KOTE yang membaham Jubor Jantan dalam Video tersebut adalah Kote Anwar Bin Ibrahim suami kepada Wan Azizah dan Papa kepada Nurul Izzah.

ii. Di bawah tajuk 'XXX - Video Anwar Ibrahim' tersebut, defendan dengan salah dan niat jahat menyiarkan suatu imej;

5. i. Pada 19 Mac 2013, defendan telah dengan salah dan berniat jahat menyiarkan di dalam laman web/blog *www.papagomo.com* tersebut perkataan-perkataan berikut:

a. Saya juga nak menegaskan di sini bahawa paparan gambar-gambar di atas ini adalah sebahagian daripada aktiviti mingguan Dato' Sri dalam menjalankan kerja homoseksual membelasah jubor-jubor lelaki terutamanya anak muda;

b. Dato' Sri Anwar Ibrahim, 6 Februari 2013 berlokasi di Hotel Hilton KL Central pada jam 1 pagi rakaman aksi Dato' Sri membelasah jubor Mahasiswa dari Sabah juga berada di tangan saya;

c. Wan Azizah, Nurul Izzah dan juga suami Nurul tahu kegiatan Dato' Sri dan saya rasa Dato' Sri pasti terkejut jika saya nyatakan bahawa menantu Dato' Sri yang akan membawa Dato' Sri keluar setiap malam bagi mencari jubor untuk dikoyakkan.

ii. Di bawah tajuk 'Saman Homoseksual RM100 Juta — Permohonan Maaf Papa Gomo Kepada Anwar Ibrahim' tersebut, Defendan dengan salah dan niat jahat menyiarkan beberapa siri imej.

What is defamatory?

[18] In *Gatley on Libel and Slander* (9th Ed) 1998 at p 7, stated:

> What is defamatory? There is no wholly satisfactory definition of a defamatory imputation. Three formulae have been particularly influential:
>
> (1) Would the imputation tend to 'lower the plaintiff in the estimation of right-thinking members of society generally'? (2) Would the imputation tend to cause others to shun or avoid the plaintiff? and (3) Would the words tend to expose the plaintiff to 'hatred, contempt or ridicule'?

[19] Hence, in the Court of Appeal case of *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371; [1999] 1 CLJ 461 the court said at p 374 (MLJ); p 467 (CLJ):

> … the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory.

[20] With reference to the defamatory statements (including images) as pleaded in the statement of claim: the defamatory statements have defamed the plaintiff. The statements are very obnoxious and obscene.

[21] The statements and the images (defamatory statements) that were pleaded hereinbefore, in ordinary and natural meaning are understood that the plaintiff is:

(a) an immoral person;

(b) a person with no dignity;

(c) a person unfit to hold public office;

(d) not qualified as a political leader;

(e) not fit to be Prime Minister of Malaysia; and

(f) a leader who is not responsible and cannot be trusted.

[22] As to whether the statements were capable of being and were, in fact defamatory of the plaintiff, the test to be considered is whether the statements complained of were calculated to expose the plaintiff to hatred, ridicule or contempt in the mind of a reasonable reader would tend to lower the plaintiff in the estimation of right thinking society generally (see *JB Jeyaretnam v Goh Chok Tong* [1985] 1 MLJ 334).

[23] The ordinary and natural meaning may therefore include any inference or implication which any inference or implication which an ordinary reasonable reader would draw from the statements.

[24] Therefore, in this case, what would an ordinary reasonable reader construe the statements to mean? Do the statements complained of were calculated to expose the plaintiff to hatred, ridicule or contempt in the mind of a reasonable reader or would tend to lower the plaintiff in the estimation of right thinking member of society generally? As the statements attack the plaintiff's moral character, dishonesty, ineligible to hold public office, not qualify as a political leader, not fit to be Prime Minister and a leader who is not responsible and cannot be trusted mean these statements had exposed the plaintiff to hatred, ridicule or contempt in the mind of a reasonable reader would tend to lower the plaintiff in the estimation of right thinking society generally.

[25] It is also attacking the moral character of the plaintiff. Hence, I opine that the statements are defamatory of the plaintiff.

WHETHER THE STATEMENTS REFER TO THE PLAINTIFF

[26] It is trite law that in a libel action the statements complained of must refer to the plaintiff.

[27] In the case of *Institute of Commercial Management United Kingdom v New Straits Times Press (Malaysia) Bhd* [1993] 1 MLJ 408; [1993] 2 CLJ 365, His Lordship Lim Beng Choon J has held:

> It is an essential element of the cause of action for defamation that the words complained of should be published 'of the plaintiff'. The test which the plaintiff has to furnish an answer to satisfy the court is whether the words would reasonably in the circumstances lead persons acquainted with the plaintiff to believe that he was the person referred to.

[28] In *Knupffer v London Express Newspaper Ltd* [1944] AC 116 is relevant, where it was held as follows: 12 OF 37:

> … it is an essential element of the cause of action for defamation that the words complained of should be published 'of the plaintiff'. Where he is not named the test of this is whether the words would reasonably lead people acquainted with him to the conclusion that he was the person referred to. The question whether they did so in fact does not arise if they cannot in law be regarded as capable of referring to him. If a defamatory statement made by a class or a group can reasonably be understood to refer to every member of it, each one has a cause of action …

[29] *Morgan v Odhams Press Ltd and Another* [1971] 2 All ER 1156 (HL) at pp 1176–1177 (which referred to *Knupffer*):

> … But here the question is not whether the words are defamatory. It is conceded they are, if they refer to the plaintiff. The question is one purely of identify. 'Are the words capable of being understood to refer to the plaintiff?' In my view, a somewhat more exacting test should be predicated where the question is one of identity. It is not sufficient for the reader to say 'I wonder if the article refers to Johnny Morgan' nor is pure speculation sufficient. Nor is it sufficient that a reasonable person believes that the words refer to the plaintiff. The test is an objective one. The ordinary reader must be fair-minded and not avid for scandal. He must not be unduly suspicious. The ordinary reader must have rational grounds for his belief that the words refer to the plaintiff.

[30] The statements pleaded in paras 3, 4 and 5 referred to the plaintiff personally. The statements also refer to his name, the wife's name and his daughter's name and readers generally know who the plaintiff, his daughter and his wife are. The plaintiff is a former Deputy Prime Minister and Minister of Finance and leader of the opposition party in Parliament, Malaysians readers know the plaintiff.

[31] This website or blog is specially made to defame the plaintiff. The defamatory statements (inclusive videos) expressly referring to the plaintiff. The words in the articles which refer to the videos also refer to the plaintiff. The defamatory statements directed at or referred to the plaintiff are too obnoxious and obscene and the words used were too extreme to defame the plaintiff.

[32] Obviously, any reasonable reader reading the defamatory statements published on the website or blog Papagomo, know the defamatory statements referred to the plaintiff. I conclude that the defamatory statements pleaded in paras 3, 4 and 5 of the statement of claim refer to the plaintiff.

WHETHER THERE IS A PUBLICATION

[33] The defendant denies that he is the owner or publisher of the website *www.papagomo.com* and denies publishing those articles and has no knowledge of who published them and they were actually published.

[34] The plaintiff called Mohd Fauzi bin Mohd Azmi ('SP1') to prove that the defendant is the blogger Papagomo.

[35] SP1 testified that he met the defendant, Wan Muhammad Azri bin Wan

Deris at the Bloggers United Malaysia Conference on 16 May 2009. The defendant admitted to SP1 that he was Papagomo. SP1 in his testimony said:

Q : Adakah kamu pernah berjumpa Defendan?

A : Pertama kali saya berjumpa beliau di Lake View Garden di Subang Jaya pada 16 Mei 2009 di dalam satu program blogger iaitu Bloggers United Malaysia Conference. Di program itu, saya telah diketemukan dengan dua orang lelaki berbadan gempal dimana salah seorang daripada mereka telah minta saya teka siapa dia. Lalu saya teka dengan betul bahawa beliau adalah blogger Papagomo dan rakannya blogger Parpukari. Kami kemudiannya bersalaman dan bersembang sekejap. Setelah itu saya meminta kebenaran untuk mengambil gambar mereka dan mereka bersetuju.

Q : Apakah nama orang yang mengaku dirinya sebagai blogger Papagomo?

A : Setahu saya, Wan Muhammad Azri bin Wan Deris.

[36] Further, SP1 testified that he took the defendant's photograph and the photograph was tendered in court as P1. SP1 can positively identify the defendant in P1. SP1 identified the gentleman in P1 on the left wearing red t-shirt with Manchester United logo is the defendant or known as Papagomo in the website *www.papagomo.com*. The defendant denied that it was him.

[37] Looking at the photograph and the defendant who was in court. I find the photograph of the defendant looks the same to the defendant. The defendant was identified by SP1 in open court. Upon requesting by the court of the defendant's name, SP1 informed the court, his name is Wan Muhammad Azri bin Wan Deris.

[38] SP1 is very consistent with his evidence, even though continuously challenged in cross-examination by the defendant's counsel; I have no doubt with his evidence and demeanor. SP1 is a credible witness.

[39] Learned counsel for the defendant objecting to the tendering of P1. I allowed P1 to be tendered as the plaintiff's evidence because it was admitted by SP1 that he is the one who took the photograph, P1. In open court on 27 January 2014, SP1 made a clear identification that the defendant, Wan Muhammad Azri bin Wan Deris was the person who admitted to him that he was the blogger 'Papagomo'. SP1 was challenged on the issue, but his evidence remains consistent. I have no doubt of his evidence. On the balance of probabilities the plaintiff has proven that the gentleman who is in red t-shirt with the Manchester United logo in P1 is the defendant or Papagomo.

[40] All the articles (Bundle B pp 1–14) which contain the statements complained of carries the name Papagomo and it was clearly identified that the defendant is the Papagomo.

[41] SP1 was an independent witness, with no motive to lie to the court and without any interest in this action.

[42] From the evidence adduced, I found that the defendant was the blogger Papagomo and the defendant had published the defamatory statements in the blog *www.papagomo.com* as pleaded in paras 3, 4 and 5 of the statement of claim.

[43] Since the defendant was the blogger Papagomo and had published the defamatory statements, the next issue for the plaintiff to prove is whether there was a publication of the statement complained of. It is immaterial for the plaintiff to prove that the defendant was the owner of the website *www.papagomo.com* because in the tort of defamation, publication is one of the essential elements for the defendant to prove.

WHETHER THE STATEMENTS WERE PUBLISHED TO THIRD PARTIES

[44] In the case of *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173; [1988] 1 CLJ Rep 233, said:

> In order to constitute publication, the defamatory matter must be published to a third party, and not simply to the plaintiff. By publication, it is meant the making known of defamatory matter, after it has been written, to some person other than the person to whom it is written, the uttering of a libel to the party libeled is no publication for the purposes of a civil action: *Wennhak v Morgan* …

[45] In our case the defamatory statements were published in the website *www.papagomo.com* ie in the internet and the people all over the world can get access to the website meaning that there was a wide publication of the defamatory statements.

[46] It is a judicial notice that the internet is used worldwide.

[47] Applying the above principles to the present case, there is no doubt that the online defamatory statements or published on the internet amounts to

publication.

OTHER ISSUES

[48] The defendant in his defence, denied receiving the notice of demand. The defendant denied that he had responded to the plaintiff's letter of demand. The demand was, inter alia, for an apology with 48 hours, and damages of RM100m.

[49] By the evidence adduce in court, there is no doubt that Papagomo was responding to the letter of demand sent to the defendant, Papagomo or the defendant had responded to the plaintiff's letter of demand through the Papagomo blog (bundle P pp 12, 13 and 14). The contents of the blog were exactly the same, including the date, amount demanded of RM100m and 48 hour notice period. The defendant was unable to explain why Papagomo was answering for him. This clearly showed that the defendant had received the notice of demand and responded to it. The defendant certainly received the letter of demand.

[50] The defendant submitted that the plaintiff ought to have obtained the identity of Papagomo from the Malaysian Communications ('MCMC') to prove who is the owner of the website failing which s 114(g) of the Evidence Act 1950 is applicable. I find that this submission has no merit, as I have decided that in the defamation suit, it is sufficient for the plaintiff to prove the defendant is the blogger Papagomo and the defamatory statements were published through the website *www.papagomo.com*, in order to succeed in his claim. The plaintiff has proved that the defamatory statements are defamatory in nature and refers to him.

[51] The defendant can publish the defamatory statements to defame the plaintiff even though he is not the owner of the website.

[52] The defendant contends that the plaintiff should have called the maker of the articles which contains the statements complained of (bundle B pp 1–14) to prove all these documents. In fact, this bundle B pp 1–14 is Part B documents where the authenticity was agreed by the defendant. These documents were placed in Part B documents.

[53] The articles or documents which contain the defamatory statements as pleaded in the statement of claim were produced in court (bundle B pp 1–14). The authenticity of the articles or documents containing defamatory statements was agreed by the defendant and placed in Part B of the bundle. Once the authenticity of the documents was agreed upon, there is no necessity for the plaintiff to call the maker of the documents.

[54] During cross-examination of SP1, learned counsel for the defendant trying to adduce evidence from four other cases (ie Kuala Lumpur High Court — 23NCVC-17–01 of 2012, Kota Bharu High Court 23NCVC-3–02 of 2012, Kota Bharu High Court 23NCVC-5–02 of 2013 and Kota Bharu High Court 23NCVC-9-04/2012) which involved different parties where SP1 was the witness in all those cases.

[55] The purpose of the defendant is to show the contradiction in SP1 evidence here and other court evidence.

[56] The plaintiff's counsel objected to this introduction of evidence because the witness statement of SP1 that the plaintiff is going to put forward was not the actual testimony given by SP1 in those courts and this trial will be rehashed of four other trials that have been conducted by different High Courts.

[57] After I have heard the submission from both sides, I agree with the submission by the plaintiff's counsel.

[58] There were no actual witness statements from SP1 that were tendered in four High Courts produced by the defendant and there were no notes of proceedings (for the cross-examination of SP1 in those four High Courts) produced in court.

[59] The defendant only has copies of the witness statement filed by SP1 for each of those cases. This court cannot rely on these witness statements as the actual witness statements were not produced in court and this will prejudice the plaintiff. As such, the court in exercising its discretion disallowed the defendant to adduce evidence pertaining to the witness statement of SP1, in those four High Court cases.

[60] Based on all the evidence adduced, on a balance of probability, I am satisfied that the plaintiff has proven that the defendant has defamed him as all the three ingredients were fulfilled.

[61] Based on the cases of *S Pakianathan* and *Abdul Rahman Talib v Seenivasagam & Anor* [1966] 2 MLJ 66, the burden now shifts to the defendant

to present his defences.

THE DEFENDANT'S DEFENCE

[62] The defendant has raised four defences, in the alternative. The defences are:

(a) the defendant is not the owner of the blog *www.papagomo.com* and did not publish the defamatory statements;

(b) defence of qualified privileged;

(c) fair comment; and

(d) justification.

A. Is the defendant the owner of the blog and did he publish the defamatory statements.

[63] The defendant in his evidence merely denies that he is the owner of the blog and did not publish the defamatory statements. The defendant failed to bring any witnesses or documentary evidence to prove his defence. In contrast, the plaintiff has proved that the defendant was the person named Papagomo and published the defamatory statements of the plaintiff through the website *www.papagomo.com*.

[64] It is sufficient for the plaintiff, on the balance of probabilities to prove the defendant is the blogger Papagomo and the defamatory statements were published through the website *www.papagomo.com*, in order to succeed in his claim. The plaintiff has proved that the defamatory statements are defamatory in nature and refers to him.

B. Qualified privileged

[65] What is qualified privilege and who bears the burden of proving it? In the case of *Tun Datuk Patinggi Haji Abdul Rahman Ya'akub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393; [1995] 1 LNS 304, the court held:

> It is a settled law that it is for the defendants to prove the facts and circumstances which established the occasion as qualified privilege when the words complained of were published.

[66] In the case of *Adam v Ward* [1917] AC 309, Lord Atkinson opined that:

> A privilege occasion is an occasion … where the person who makes a communication has an interest or duty, legal, social or normal to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it; the reciprocity is essential.
>
> It is essential for the defense of qualified privilege to succeed; satisfy at least two criteria, ie, one, there is a legal, moral or society's duty to make the statement on one side. The other is that there is a corresponding interest to receive it. However, if it is spiked with malice, the defence will not be available, (see *Rajagopal v Rajan* [1971] 1 LNS 117).

[67] From the evidence adduced, it is not proven by the defendant that he is the person who has an interest or duty, legal, social or normal to make the statements on one side. The defendant failed to prove that there was a corresponding interest from the other side (to whom it is made) to receive it.

[68] In the case of *Abdul Rahman Talib* the court emphasised that the element of reciprocity is essential to support the defence of qualified privilege as follows:

> A common interest for the purpose of the defence of qualified privilege to an action for libel occurs where the words complained of as defamatory were published in pursuance of an interest or of a duty, legal, social, or moral, to publish them to the person to whom they were published and the person to whom they were published had a corresponding interest or duty to receive them. The reciprocity is essential. The bona fide belief of the defendant that there existed such an interest or that he was under such a duty to make the communication is immaterial, for the thing which is relevant to the question whether or not the occasion was privileged is the existence in fact of the duty or interest and not merely the defendant's belief in the existence of the one or the other.

[69] Now, the burden is on the defendant, to prove the defence of qualified privilege. After scrutinising all the evidence, I find that the defendant has not proved the defence of qualified privilege. The reasons were that the element of reciprocity is completely absent and the defendant is not the person who has the interest or duty, legal, social or normal to make the statements.

[70] The defendant failed in his defence of qualified privilege, therefore it is not necessary for the plaintiff to prove malice against the defendant — see *Hoe Thean Sun & Anor v Lim Tee Keng* [1999] 3 MLJ 138; [1999] 1 CLJ 187.

C. Fair comment

[71] As a defence in the alternative, the defendant pleaded a defence of fair comment. Section 9 of the Defamation Act 1957 provides that:

In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or rendered to in the words complained are proved.

[72] Fair comment is a defence for the defamatory statements which relates to matters of public interest. To be successful in this defence, the defendant must prove that:

(a) defamatory statements must be the statements complained of is a comment, although the statements may be composed of or including inference of facts;

(b) the comments must be related to the public interest; and

(c) comments are based on facts; the true facts existed at the time the defamatory statements were published.

[73] A comment is a statement of opinion based on facts — see *Tun Datuk Patinggi Hj Abdul Rahman Ya'akub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393.

[74] Upon perusing the evidence in this action, I found that there is no iota of evidence to prove that the defamatory statements as pleaded are true or a fair comment on a matter of public interest.

[75] It is not proven that the defamatory statements are matters of public interest. Hence, I found that the defendant fails in his defence of fair comment.

JUSTIFICATION

[76] The defendant has raised the defence of justification in that defamatory statements were true. That being the case, the defendant bear the burden of proving his defence — refer to *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86; [1980] 1 LNS 31.

[77] Once the statements complained of are proved to be defamatory and published, the plaintiff is bound to prove the falsity of these statements because the law presumes it to be in his favour and the result is that it is for the defendant to prove that these statements are true — see *International Times* case.

[78] Upon examination and evaluation of the defendant's evidence in it's entirely, I am unable to find anything which is capable of establishing that the

allegations made by the defendant against the plaintiff were true. In fact, there was no evidence adduced to establish that the allegations by the defendant against the plaintiff are true.

[79] In the circumstances, I hold that the defendant has failed to prove his defence of justification against the plaintiff for defamation.

[80] Based on the above reasons, the court found that the defendant had failed to prove his defences and I found the statements as pleaded in the statement of claim are defamatory statements committed by the defendant and this has caused an injury and losses to the plaintiff. As such the plaintiff is entitled to be compensated by the defendant.

DAMAGES

[81] The award of damages is at the discretion of the court. Damages should be fair and adequate.

[82] In the case of *Chin Choon @ Chin Tee Fut v Chua Jui Meng* [2005] 3 MLJ 494; [2005] 2 CLJ 569 where His Lordship Justice Sri Ram JCA had made reference to the book 'Defamation Law, Procedure and Practice' by Price and Doudu (3rd Ed), p 208 where the learned authors set out several factors to be taken into account in determining the quantum of damages for defamation cases as follows:

(a) the gravity of the allegation;

(b) the size and influence of the circulation;

(c) the effect of the publication;

(d) the extent and nature of the claimant's reputation;

(e) the behavior of the defendant;

(f) the behavior of the claimant.

[83] It is not disputed; the plaintiff is a famous and leading politician at national and international level. He is currently an opposition leader. He was a former Deputy Prime Minister and Finance Minister.

[84] It is not disputed that the defamatory statements were published on the internet and sensationalised and widely circulated and can be accessed throughout Malaysia and the world.

[85] The gravity of the defamatory statements is very serious. The allegations

were highly libelous to the plaintiff. Any award to be awarded must be sufficient to vindicate the gravity of the allegations against the plaintiff.The defamatory statements that were published by the defendant were very obnoxious and obscene. The sting of the defamatory statements will tarnish the reputation of the plaintiff.

[86] Furthermore, it was accessible and circulated throughout the world. The defendant has abused the usage of the internet.

[87] In Clerk and Lindsell on *Torts*, (18th Ed), the learned author says about the exemplary damages:

> … exemplary or punitive damages which are awarded to teach the defendant that 'tort does not pay' and to deter him and others from similar conduct in the future.

[88] The defamation statements which are extreme, vicious and vulgar nature of the language used against the plaintiff, failure to apologise, and the defendant's conduct in repeating the allegations in a vicious manner in subsequent blog entries in response to the letter of demand, allows this court to grant the exemplary damages to the plaintiff.

[89] Perhaps it would be appropriate for this court to examine the pattern of damages awarded by the court in order to ascertain a fair and suitable damages to be awarded to the plaintiff. In *Chin Choon @ Chin Tee Fut v Chua Jui Meng* [2005] 3 MLJ 494 where the defamation case involved a Cabinet Minister, the Court of Appeal awarded the damages of RM200,000. In *Abduk Razak bin Mohd Noor v Wan Muhammad Azri bin Wan Deris, Kuala Lumpur High Court,* Writ Summons No 23NCVC-17–01 of 2012 where the court awarded RM500,000 as general and exemplary damages for a defamation claim.

[90] The amount of damages to be awarded by the court in each case depends on the facts and the circumstances of the case. Looking at the facts of this case, the standing of the plaintiff, the fact that the defamatory statements which used the extreme, vicious and vulgar nature of language were published widely and the defendant failed to apologise to the plaintiff, despite the notice of demand was given and the injury and losses caused to the plaintiff, I feel the sum RM800,000 is fair and reasonable to be awarded as general and exemplary damages.

[91] I also allowed prayer 15 (iv), (v) and (vi) of the statement of claim. Costs at RM50,000 to be paid by the defendant to the plaintiff.

Plaintiff's claim allowed with costs of RM50,000.

Reported by Kanesh Sundrum